NO. 80-830

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE ADVERTISER COMPANY

Petitioner,

v.

DAVID H. FULTON and WILLIAM B. WYATT,

Respondents.

MOTION FOR LEAVE TO FILE AND AMICUS BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SAMUEL H. CARTER, ESQ.
South Carolina Press Association
P. O. Box 11205
Columbia, South Carolina 29211

Phone: (803) 254-0013

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

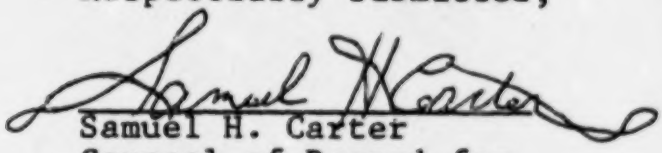
The South Carolina Press Association respectfully moves for leave to file the attached Brief amicus curiae. The attorney for respondent has refused to consent. The consent of attorney for the petitioner has been obtained.

The Association is a trade association with a voluntary membership consisting of all the daily newspapers and a substantial majority of the weekly newspapers in South Carolina. The possibility that the ruling below may be followed in South Carolina in similar cases makes this case important to this Association.

The Association has reviewed the Petition and Brief already filed with the Court and would like to point out significant additional arguments. The Association's Brief demonstrates (1) that the

decision below applies a standard for summary judgment that is in conflict with the decision of numerous State courts, and (2) that the decision below embodies an interpretation of a prior decision of this Court which conflicts with the interpretation of other State courts.

Respectfully submitted,



Samuel H. Carter
Counsel of Record for
South Carolina Press
Association

NO. 80-830

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE ADVERTISER COMPANY

Petitioner,

v

DAVID H. FULTON and WILLIAM B. WYATT,

Respondents.

AMICUS BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SAMUEL H. CARTER, ESQ.
South Carolina Press Association
P.O. Box 11205
Columbia, South Carolina 29211

Phone: 803/254-0013

QUESTION PRESENTED FOR REVIEW

Whether the First and Fourteenth Amendments permit a court to deny summary judgment in favor of a newspaper in a libel suit brought by a public official, when there is no clear and convincing evidence of actual malice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	7
I. The disposition of summary judgment motions in libel suits by public figures involves the First Amendment	7
II. The Alabama Court's interpretaion of New York Times conflicts with that followed by numerous other state courts and federal courts	10
III. The Alabama Supreme Court's interpretation of footnote 9 in Hutchinson v. Proxmire, ___ U.S. ___, 99 S.Ct. 2675 (1979), conflicts with that of the courts of Massachusetts and the District of Columbia	13
CONCLUSION	18
APPENDIX A (A copy of alleged libelous article as stated in the Complaint)	A-1
APPENDIX B (A copy of press release)	A-4

TABLE OF AUTHORITIES

	Page
American Benefit Life Ins. Co. v. McIntyre, 375 So.2d 239 (Ala. 1979)	6, 14, 15
Bandelin v. Pietsch, 563 P.2d 395 (Idaho 1977)	10, 11
Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (CA 5 1970)	9, 12
Carson v. Allied News Co., 529 F.2d 206 (CA 7 1976)	9
Chase v. Daily Record, Inc., 515 P.2d 154 (Wash. 1973)	10, 12
Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342 (Pa. 1978)	10, 12
DiLeo v. Koltnow, 613 P.2d 318 (Col. 1980)	9, 11
Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107 (CA 7 1977)	9, 12
Good Government of Seal Beach, Inc. v. Superior Court, 586 P.2d 572 (Cal. 1978)	9, 11
Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (CA 9 1974)	9, 12
Hutchinson v. Proxmire, U.S. ____, 99 S.Ct. 2675 (1979)	13
Hutchinson v. Proxmire, 431 F.Supp. 1311 (W.D. Wis. 1977)	14

TABLE OF AUTHORITIES

	Page
Kidder v. Anderson, 354 So.2d 1306 (La. 1978)	10, 12
Loveless v. Graddick, 325 So.2d 137 (1975)	.6
MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830 (Wyo. 1980)	10, 12
Manuel v. Fort Collins Newspapers, Inc., 599 P.2d 931 (Col. Ct. App. 1979)	10
Nader v. de Toledano, 408 A.2d 31 (D.C. 1979)	10, 11, 13, 16
National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996 (Mass. 1979)	10, 12, 16
New York Times v. Sullivan, 376 U.S. 254 (1964)	passim
Oliver v. Village Voice, Inc., 417 F.Supp. 235 (S.D.N.Y. 1976)	.9, 12
Time, Inc. v. McLaney, 406 F.2d 565 (CA 5 1969)	.9, 12
Washington Post Company v. Keogh, 365 F.2d 965 (D.C. Cir. 1966)	.8, 12
Wigmore on Evidence	17

STATEMENT OF THE CASE[1]

Respondents, Wyatt, a former Deputy Director of the State Building Commission of Alabama, and Fulton, a former Building Inspector for the Commission, brought libel actions against Petitioner, The Advertiser Company. The libel claims arose from an article entitled "Officials Fired Following Probe." The article[2] stated that the respondents and other employees of the State Building Commission had been fired following "an investigation into mishandling of building contracts and state work on private property", which uncovered "widespread abuses." Pet. App. at A-4. According to the article, Bronner, Director of Finance

---

1 "Pet. App." in this Brief refers to the appendix to the petition of the Advertiser. "Pet." refers to the petition of the Advertiser. "App." refers to the appendix to this Brief.

2 The allegedly libelous portions of the article as quoted in the complaint are attached to this Brief as Appendix A.

for the State of Alabama, had disclosed that the investigation had uncovered evidence of questionable activities and management in four areas. Bronner, the article reported, said that one of the employees fired was a building inspector who had not turned in an inspection report in seven years and that the results of the investigation would be turned over to the State Attorney General. The article also reported other statements by Bronner pertaining to the investigation and the firing of the employees.

The information in the article was obtained at a press conference where Bronner issued a press release. The release stated that evidence had been received relating to four types of questionable activities. It also stated that six employees had been discharged as a result of the information gathered and a review of the qualifications and performance of Building Commission personnel. App. at A-4.

At the press conference Bronner also stated that respondents were among the employees discharged. Bronner stated further that no charges had been made against the discharged employees and that they had been discharged because of their qualifications and performance. Pet. App. at A-28.

After the respondents filed suit, The Advertiser moved to dismiss on the ground, among others, that respondents were public officials and the alleged libelous article had been published without actual malice on the part of The Advertiser. In support of the motion, the press release[3] as well as affidavits from Bronner and others were submitted. The motion was converted into a motion for summary judgment. The Advertiser contended that summary judgment in its favor

---

[3] A copy of the press release was attached to the affidavit of Bronner as Exhibit C and is reproduced for the Court in Appendix B to this Brief.

was essential, in accord with New York Times v. Sullivan, 376 U.S. 254 (1964), to protect its right of freedom of the press guaranteed by the First and Fourth Amendments.

In opposition, respondents submitted their own affidavits challenging the truth of the press release and Bronner's statements. Respondents failed, however, to offer any evidence that The Advertiser had published the article with knowledge that it was false or with reckless disregard of whether it was false or not.

The Alabama Circuit Court granted The Advertiser's motion for summary judgment. The court held that Bronner's statements about the respondents were protected by a qualified executive privilege under Alabama law. It held further that The Advertiser was protected by the same privilege because its "account of the [press] conference was fair" and "the paper was merely printing the news as it found it." Pet. App. at A-21.

When the respondents appealed to the Alabama Supreme Court, The Advertiser argued again that summary judgment in its favor was required to protect its First and Fourteenth Amendment rights of freedom of the press, and relied upon New York Times and its progeny. The Supreme Court of Alabama, however, rejected the newspaper's arguments. The court concluded that summary judgment was not appropriate because (1) the record indicated that the newspaper had failed to report specifically that one stated reason for respondents' discharge was their "qualifications and performance"; and (2) that there was no evidence that the newspaper had made an independent investigation regarding the truth of the statements made by Director of Finance Bronner. Those two aspects of the record, in the opinion of the Alabama Supreme Court, created a material issue of fact requiring a full trial on the libel issue.

The Alabama Court based its denial of summary judgment in favor of The Advertiser primarily on two of its earlier decisions, American Benefit Life Ins. Co. v. McIntyre, 375 So.2d 239 (1979) and Loveless v. Graddick, 325 So.2d 137 (1975). In American Benefit, the Alabama Court held that

> neither New York Times v. Sullivan nor Mobile Press Register, Inc. v. Faulkner [(an opinion of the Alabama Court)] requires the application of a clear and convincing evidence test on a motion for summary judgment

id. at 249, and declared that the Alabama "Scintilla Rule" rather than the New York Times "clear and convincing evidence" test applied to motion for summary judgment in libel suits by public figures. In Loveless the court concluded that the "Scintilla Rule" requires denial of summary judgment "if there is a scintilla of evidence in the plaintiff's favor" and that summary judgment is "peculiarly inappropriate" on the issue of malice in libel suits.

REASONS FOR GRANTING THE WRIT

Amicus believes that there are at least three additional reasons why the Court should resolve the questions raised by the Alabama Supreme Court's refusal to adhere to the "clear and convincing evidence" test at the summary judgment stage of libel suits by public officials.

I.

The disposition of summary judgment motions in libel suits by public figures involves the First Amendment.

The availability of summary procedures in libel suits by public officials is essential to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Company v. Sullivan, 376 U.S. 254, 270 (1964). Unless critics of

public officials are effectively shielded from the expense and harassment of meritless libel suits, the protections offered by New York Times may be of little value. The following quotation from Washington Post Company v. Keogh, 365 F.2d 965, 968 (CA D.C. 1966) shows clearly the need for vindication of First Amendment rights at the summary judgment stage:

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the Times principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits.

> Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured of freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent, debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open.

A host of federal and state decisions have acknowledged the importance of applying the standards of New York Times at the summary judgment stage in order to protect First Amendment freedoms.[4]

---

[4] See e.g. Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107 (CA 7 1977); Carson v. Allied News Co., 529 F.2d 206, 210 (CA 7 1976); Guam Federation of Teachers Local 1581 v. Ysrael, 492 F.2d 438, 441 (CA 9 1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-67 (CA 5 1970) ("actual malice is a constitutional issue to be determined initially by the trial judge on any motion for summary judgment); Time, Inc. v. McLaney, 406 F.2d 565, 566, 572-73 (CA 5 1969); Oliver v. Village Voice, Inc., 417 F.Supp. 235, 237 (S.D.N.Y. 1976); Good Government of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 578 (Cal. 1978); DiLeo v. Koltnow, 613 P.2d 318, 323 (Col. 1980) (en banc) ("were not summary judgment granted in proper cases, the threat of protracted litigation might have a chilling effect

II.

The Alabama Court's interpretation of New York Times conflicts with that followed by numerous other state courts and federal courts.

The record in this case contains no clear and convincing evidence of malice as defined by New York Times. Nevertheless,

---

4 (Cont'd) upon the full and free exercise of the First Amendment rights. . . protected by New York Times); Manuel v. Fort Collins Newspapers, Inc., 599 P.2d 931, 933-34 (Col. Ct. App. 1979); Nader v. de Toledano, 408 A.2d 31, 43-44 (D.C. 1979); Bandelin v. Pietsch, 563 P.2d 395, 399 (Idaho 1977) ("first amendment is not without protection in summary judgment proceedings"); Kidder v. Anderson, 354 So.2d 1306, 1310 (La. 1978) ("In cases affecting the exercise of First Amendment liberties, proper summary judgment procedure is essential"); National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1003-04 (Mass. 1979); Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342, 1346-48 (Pa. 1978) (opinion for equally divided court); Chase v. Daily Record, Inc., 515 P.2d 154, 158 & n.3 (Wash. 1973) (en banc); MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 831-32 (Wyo. 1980) (summary judgment is "the most appropriate remedy in order to minimize the chilling effect of litigation").

the Alabama court has concluded that New York Times does not require the application of the "clear and convincing evidence test" on motion for summary judgment.

In direct conflict with the Alabama Court's interpretation of New York Times, many other state courts have concluded that a proper application of New York Times requires that summary judgment be granted when there is no evidence of malice in the New York Times sense.[5] Many federal courts have also concluded that New York Times

---

[5] See, e.g., Good Government Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572, 578 (Cal. 1978); DiLeo v. Koltnow, 613 P.2d 318, 323 (Col. 1980) (en banc) (plaintiff had "not successfully shown by convincing clarity that the defendants published the article with actual malice, and accordingly, summary judgment was properly granted"); Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979) ("the question to be resolved at summary judgment is whether plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity"); Bandelin v. Pietsch, 563 P.2d 395, 399 (Idaho 1977) ("Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is

requires the application of the clear and convincing evidence test on motions for summary judgment.[6]

---

5 (Cont'd) entitled to summary judgment"); Kidder v. Anderson, 354 So.2d 1306, 1310 (La. 1978) ("in order for plaintiff to be successful on the threshold issue of summary judgment, he must come forth with strong evidence, convincing clear evidence, that defendant either [sic] know the statements published were false or that he had reckless disregard of whether they were false or not."); National Ass'n of Govt. Employees v. Central Broadcasting Corp., 396 N.E.2d 996, 1002 (Mass. 1979); Curran v. Philadelphia Newspapers, Inc., 395 A.2d 1342, 1348 (Pa. 1978) (opinion of equally divided court) ("Unless the court finds . . . that the plaintiff can prove actual malice in New York Times sense, it should grant summary judgment for the defendant"); Chase v. Daily Record, Inc., 515 P.2d 154, 158 n.3 (Wash. 1973) (en banc) ("we think that simply requiring a degree or a standard of 'convincing clarity' in itself imposes the required level or quantum of proof"); MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 832 (Wyo. 1980).

6 See, e.g., Fadell v. Minneapolis Star and Tribune Co., Inc., supra, at 108; Guam Federation of Teachers Local 1581 v. Ysreal, supra, at 441; Bon Air Hotel, Inc. v. Time, Inc., supra, at 864-65; Time, Inc. v. McLaney, supra, at 573; Washington Post Company v. Keogh, supra, at 972; Oliver v. Village Voice, Inc., supra, at 237.

The Court should act quickly to resolve the conflict regarding the proper application of New York Times to summary judgment motions. As long as it remains uncorrected, the Alabama court's ruling chills the free exercise of First Amendment freedoms.

Moreover, there is considerable confusion among the courts that apply the "clear and convincing evidence test" as to exactly how it should be applied. See Nader v. de Toledano, 408 A.2d 31 (D.C. 1979). That confusion, as well, should be dispelled.

III.

The Alabama Supreme Court's interpretation of footnote 9 in Hutchinson v. Proxmire, U.S. , 99 S.Ct. 2675, (1979), conflicts with that of the courts of Massachusetts and the District of Columbia.

The confusion about the application of New York Times to motions for summary judgment arises in part from uncertainty as to the meaning of footnote 9 in Hutchinson v.

Proxmire, supra. In Proxmire, the District Court suggested that, in determining whether there had been an adequate showing of actual malice, "'summary judgment may well be the "rule" rather than the "exception".'" Id. 431 F.Supp. 1311, 1330 (W.D. Wis. 1977). This Court's opinion in Proxmire did not address the summary judgment issue. The District Court's suggestion regarding summary judgment, however, provoked the following dictum in footnote 9 of the Court's opinion:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, New York Times v. Sullivan . . . and does not readily lend itself to summary disposition. [Citations omitted]. In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

The Alabama Supreme Court misinterpreted the dictum of footnote 9 as a holding. See American Benefit Life Ins. Co.

v. McIntyre, supra at 249. Moreover, the Alabama Court went so far as to suggest that Proxmire rendered the States free to apply their own standards to summary judgment motions even though the ultimate verdict might be governed by the standards set forth in New York Times. The Alabama Court stated:

> The burden on a movant in a summary judgment case involving libel continues to be grounded upon state law. Hutchinson v. Proxmire . . . .

On the basis of footnote 9 in Proxmire, the Alabama Supreme Court rejected the "clear and convincing evidence" test as a standard for summary judgment and adopted instead its own scintilla rule - a rule which in the case at hand prevented summary judgment for the newspaper even though the plaintiffs have no chance of prevailing under the standards of New York Times.

Amicus contends the proper interpretation of footnote 9 is reflected in the

opinion of the Massachusetts Supreme Judicial Court in National Ass'n of Govt. Employees, Inc. v. Central Broadcasting Corporation, supra at 1003. In reversing a denial of summary judgment in National Ass'n, the Massachusetts court acknowledged footnote 9 in Proxmire. Nevertheless, the Massachusetts court declared that Proxmire did not mean that a plaintiff could survive summary judgment without producing "the requisite quantum of evidence to enable him to reach the jury with his claim." Likewise, the District of Columbia Court of Appeals in Nader v. deToledano, supra at 44, recognized that summary judgment remains "a useful method of disposing of constitutional libel actions -- where appropriate," even though footnote 9 in Proxmire had sounded "a note of caution in this area." And the court went on to declare that

> The question to be resolved at summary judgment is whether plaintiff's proof is sufficient such

> that a reasonable jury could find malice with convincing clarity.

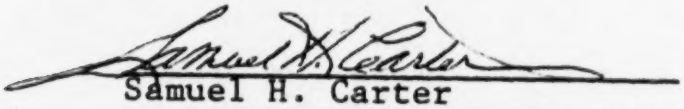
Id at 50.

Footnote 9, as interpreted by the Alabama Supreme Court, signals a retreat from the principles of New York Times in the context of summary judgment. As interpreted by the courts of Massachusetts and the District of Columbia, footnote 9 is only a note of caution against an excessively liberal use of summary judgment. The confusion that has arisen regarding the meaning of footnote 9 threatens to chill the exercise of First Amendment freedoms. In South Carolina where the "scintilla rule" is still invoked, at least in name, see IX Wigmore on Evidence § 2494 n.12 (1980 Pocket Supplement), the confusion is especially chilling because of the possibility that the Alabama rule may be followed.

CONCLUSION

Amicus begs the Court to resolve the conflict regarding the proper standards to be applied to summary judgment motions in libel suits brought by public officials and regarding the meaning of footnote 9 in the Proxmire opinion. The uncertainty about these questions threatens the exercise of rights vital to the proper functioning of the government. If the Alabama Court's position on these questions is not corrected, other courts that have not addressed them, like the Supreme Court of South Carolina, may follow the lead of the Alabama Court. Delay in the resolution of the issues may be detrimental to the freedom of expression in South Carolina and other States as well.

Respectfully submitted,



Samuel H. Carter
Attorney for South Carolina
Press Association Amicus.

APPENDIX A

The director, deputy director and four other employees of the State Building Commission were fired Tuesday in the wake of an investigation into mishandling of building contracts and state work on private property.

Finance Director David Bronner said Building Commission Director Hugh Adams, Deputy Director William Wyatt, Energy Division Chief John Cluck and three building inspectors were fired by the Commission's executive committee after the investigation uncovered widespread abuses in the department.

Bronner directed the six-week investigation by members of the Examiners of Public Accounts, the Department of Public Safety, and the Finance Department.

The results were turned over to Attorney General Charlie Graddick for further investigation.

W. G. Stevenson, a professional engineer and veteran employee of the Commission, was appointed temporary director of the department. Other vacancies will be filled later, but Bronner said some of the vacancies will probably remain unfilled.

The finance director said one of the fired building inspectors had not turned in an inspection report in seven years.

The dismissed inspectors were identified as David Fulton, Ray Martin and Howard Wilson.

Bronner said the investigation uncovered evidence of questionable activities and management in four areas:

--The use of State employees on State time to do private business.

--The discovery of employees on the payroll who provided little or no service to the State.

--Allowing or initiating construction change orders resulting in contractors receiving greater profits.

--The use of gratuities and agents in order to secure State business.

Contractors and architects wanting to do business with the State were told they would have to get an agent with political influence before they could get a State contract, Bronner said. The contractor or architect negotiated with the agent to use his influence, the finance director added.

But contractors and architects who used agents in the past would not be barred from doing business with the State, he said.

"This is more a problem of the State than of the architects and contractors," he said. "They had to go through the system, and the system was bad."

Bronner said in reply to questions that none of the private work involved the new home of former Gov. George Wallace or property of his relatives.

The finance director declined to answer when asked if the private work involved property belonging to any of the dismissed employees.

Change orders were freely given with the result that contractors could bid low on a project and then add unbid modifications to increase the price to a more profitable level, he said.

The investigators examined commission activities over a five or six-year period during which contracts involving millions of dollars in school and other building construction were issued.

The firings did not have to go through the state personnel system because the employees were appointed by the Building Commission outside the merit system, Bronner said.

The Commission's executive council is composed of Bronner, State Superintendent of Education Wayne Teague and State Rep. James Sasser of Ozark.

Adams had been Commission Director since 1964 and had been with the Commission staff since 1959.

Wyatt was appointed to the Commission staff as Deputy Director in 1971.

Cluck joined the Commission staff in December 1977 as chief building energy engineer.

Bronner said the dismissed employees were not given a chance to resign because they knew for at least two weeks they were being investigated and had not resigned.

PRESS CONFERENCE
May 29, 1979
2:00 P.M.

A financial investigation authorized by Title 41 of the Code of Alabama has been conducted into the Alabama Building Commission.

The investigation was conducted by the Examiners of Public Account, the Department of Public Safety and the Finance Office, which included taking sworn deposition from employees of the Building Commission, architects, contractors and testing firms from throughout Alabama.

As a result of this financial investigation, evidence of questionable activities and management was received relating to the following:

(1) The utilization of State employees on State time to do private business.

(2) The discovery of employees on the payroll who provided little or no service to the State.

(3) Allowing and/or initiating construction change orders resulting in contractors receiving greater profits.

(4) The utilization of gratuities and/or agents in order to secure state business.

Based on the information produced by the financial investigation and a thorough review of the qualifications and past performance of the present Building Commission

personnel, the "Personnel and Finance Committee" of the Building Commission discharged six employees.

All results of the investigation will be turned over to the Attorney General to be utilized as he sees fit.

see 80

831